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R. *v.* Zinck, [2003] 1 S.C.R. 41, 2003 SCC 6

Thomas Robert Zinck *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario *Intervener*

Indexed as: R. *v.* Zinck

Neutral citation: 2003 SCC 6.

File No.: 28367.

2002: October 7; 2003: February 20.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for new brunswick

Criminal law — Sentencing — Delayed parole eligibility — Interpretation and application of s. 743.6 of Criminal Code — Whether sentencing judge erred in his application of s. 743.6 — Whether application of s. 743.6 required evidence of special or exceptional circumstances — Criminal Code, R.S.C. 1985, c. C-46, s. 743.6.

Criminal law — Sentencing — Sentencing hearing — Procedural fairness — Delayed parole eligibility — Whether Crown should give offender advance notice of its intention to apply for delayed parole — Whether sentencing judge's reasons must clearly state why delayed parole order is made — Criminal Code, R.S.C. 1985, c. C-46, s. 743.6.

Having shot and killed his neighbour, the accused pleaded guilty to manslaughter. The trial judge sentenced him to a 12-year term of imprisonment and ordered that his parole eligibility be delayed for six years under s. 743.6 of the *Criminal Code*. The Court of Appeal upheld the sentence. The accused appealed to this Court on the issue of delayed parole.

Held: The appeal should be dismissed.

In the case of criminal offences falling within the scope of s. 743.6 of the *Criminal Code*, delaying parole can be a significant component of a sentence. The extent of conflict in the interpretation and application of s. 743.6 in the case law has been overplayed. Generally speaking, delayed parole is a decision that remains out of the ordinary and must be used in a manner that is fair to the offender. The sentencing judge must first determine the appropriate punishment for the crime, taking into account and weighing all relevant factors. The analysis then may shift to the exercise of the power to delay parole. Section 743.6 should not be applied in a routine manner. The judge must once again apply the sentencing factors. In the course of the second balancing, priority is given to the factors of general and specific deterrence as well as denunciation. The prosecution has the burden of establishing that additional punishment is required. Delayed parole should not be ordered without necessity; it should be invoked only on the basis of demonstrated need.

Section 743.6 does not require the creation of a special and distinct hearing on the issue of delayed parole. The issue should be raised in a fair and timely manner so as to allow the offender to respond effectively. A breach of this basic obligation would justify quashing the order. There is no obligation on the Crown, however, to give the offender written notice that delayed parole will be applied for. Fairness requires only that the offender be informed clearly that a s. 743.6 application is being made. The offender must be allowed to make submissions and to introduce additional evidence, if needed. At the end of the process, the offender is entitled to reasons that must state with sufficient

clarity why the delayed parole order is made. While the reasons need not be elaborate, the basis of the decision must be at least ascertainable from the record. Deficiencies in reasons may sometimes require quashing an order.

In this case, the trial judge did not err in his application of s. 743.6 and his order to delay parole was justified. Although not extensive, the trial judge's reasons, viewed as a whole and read in connection with the evidence and the submissions made at the hearing, permit an appellate court to ascertain and review the basis of his order. The trial judge carefully reviewed all relevant facts, particularly the gratuitousness of the crime and the need to protect the public. They confirm his conclusion that the objectives of deterrence and denunciation could not be justified without delaying parole eligibility. The sentencing hearing did not breach the rules of procedural fairness. In its submissions at the hearing, the Crown asked for delayed parole. The defence was given a sufficient opportunity to respond, but failed to use it.

Cases Cited

Referred to: *R. v. Goulet* (1995), 97 C.C.C. (3d) 61; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *R. v. Shropshire*, [1995] 4 S.C.R. 227; *R. v. Chaisson*, [1995] 2 S.C.R. 1118; *R. v. Dankyi* (1993), 86 C.C.C. (3d) 368; *Boulanger v. La Reine*, [1995] R.J.Q. 1975; *R. v. Ferguson* (1995), 64 B.C.A.C. 211; *R. v. Smith* (1995), 37 C.R. (4th) 360; *R. v. Osborne* (1996), 110 C.C.C. (3d) 161; *R. v. Nash-Levy* (1998), 207 N.B.R. (2d) 45; *R. v. Traverse* (1998), 126 C.C.C. (3d) 462; *R. v. Demedeiros*, [1999] O.J. No. 1523 (QL); *R. v. Hanley* (1998), 228 A.R. 291; *R. v. Matwiy* (1996), 105 C.C.C. (3d) 251; *R. v. Williston* (1999), 209 N.B.R. (2d) 270; *R. v. Cormier* (1999), 140 C.C.C. (3d) 87; *R. v. Dodd* (1999), 139 C.C.C. (3d) 2; *Corneau v. La Reine*, [2001] R.J.Q. 2509; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26.

Statutes and Regulations Cited

Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 120(1) [repl. 1995, c. 42, s. 34], (2) [*idem*], 128(1) [am. *idem*, s. 69(*h*)], (2) [repl. *idem*, s. 42].

Criminal Code, R.S.C. 1985, c. C-46, ss. 718, 743.1(1) [repl. 1995, c. 22, s. 6], (2) [*idem*], 743.6 [repl. 1995, c. 42, s. 86], 745.4.

Authors Cited

Dumont, Hélène. *Pénologie: Le droit canadien relatif aux peines et aux sentences*. Montréal: Thémis, 1993.

Manson, Allan. "Judges and Parole Eligibility: Section 741.2" (1995), 37 C.R. (4th) 381.

APPEAL from a judgment of the New Brunswick Court of Appeal (1999), 209 N.B.R. (2d) 257, [1999] N.B.J. No. 84 (QL), affirming a judgment of the Court of Queen's Bench. Appeal dismissed.

Eric J. Doiron, for the appellant.

Michel O. LeBlanc and *Luc J. Labonté*, for the respondent.

David Finley, for the intervener.

The judgment of the Court was delivered by

LEBEL J. —

I. Introduction

1 On November 20, 1996, the appellant Thomas Zinck shot and killed his 19-year-old neighbour, Stéphane Caissie. He was charged with second degree murder. He pleaded guilty to manslaughter. The trial judge sentenced him to a 12-year term of imprisonment and ordered that his parole eligibility be delayed for six years under s. 743.6 of the *Criminal Code*, R.S.C. 1985, c. C-46. The appellant challenged this part of his sentence in the New Brunswick Court of Appeal and now in this Court, where it is the sole issue remaining on appeal. In his view, the order to delay parole eligibility was made without evidence of the exceptional circumstances which would justify it, without

sufficient reasons being given by the trial judge, and after a hearing conducted in breach of procedural fairness. None of these grounds has been established. For the reasons which follow, I would dismiss this appeal.

II. Background

2 At the time of his trial, Zinck was 56 years old. He had a long history of run-ins with the law. His extensive criminal record speaks for itself. It goes back some 30 years. It includes a conviction for robbery, for which he received a 10-year jail sentence, together with a string of thefts and other property crimes. A number of alcohol and gun offences, as well as breaches of parole or probation, are also listed in this record.

3 The victim was a neighbour of the accused. Based on the evidence, it seems that they got along well. At the time, Zinck drank heavily. He was also fond of firearms and kept a number of them in his house. Before the shooting, three successive break-ins had occurred at the Caissie house. It appears that Zinck took it on himself to watch for burglars. This plan led to Caissie's tragic death. On the day of the shooting, Zinck had been drinking heavily. It seems that he thought he had noticed burglars. So he went to Caissie's house, where the victim was in bed. Zinck was carrying a loaded gun. He started banging on the door. Stéphane Caissie went to the door to check what was going on. He opened the door. The gun went off. Caissie was killed instantly.

4 Zinck was never able to explain what happened. As the trial judge found, he was heavily intoxicated at the time of the shooting, he was fascinated with guns especially when he was drunk, and he had said, shortly after the shooting, that he had "got one" (a burglar). As mentioned above, he was charged with murder, but agreed to plead guilty to the reduced and included offence of manslaughter.

III. Judicial History

A. *New Brunswick Court of Queen's Bench*

5 On November 17, 1997, following the guilty plea, Godin J. adjourned the sentencing hearing to December 22. Zinck had legal representation throughout. During the hearing, Crown counsel reviewed the circumstances of the crime and the record of the accused. He asked the court to consider a 15-year term of imprisonment as a fit punishment for the offence. Then, close to the end of his submissions, the Crown prosecutor raised the issue of delayed parole and of the application of s. 743.6

of the *Code*. He asked the trial judge to consider applying this provision and delaying parole. His argument on the issue was very brief. Counsel stated only that he was asking for delayed parole because Zinck had violated parole before.

6 After a break of a few hours, defence counsel made representations on behalf of his client. His argument addressed the issues pertaining to what should be the appropriate punishment. Despite the application for delayed parole made by the Crown, the lawyer who was then acting for the appellant never mentioned the issue during his argument.

7 The trial judge rendered an oral judgment after the close of counsel's submissions. In his reasons, Godin J. reviewed the circumstances of the crime at length. He discussed the criminal record of the accused and considered his character and problems, particularly his drinking habits and inclination towards violence. He also observed that, from his past record, the accused did not "appear to be a good candidate for rehabilitation". He then turned to a discussion of the principles, objectives and factual considerations which govern sentencing. He stated that the crime amounted to an unexplained act of totally gratuitous violence, committed in the home of the victim. Given the poor prospects for rehabilitation, he stated that the protection of the public appeared as the key factor that should inform his decision in this case. He therefore decided to impose a term of 12 years of incarceration.

8 The judge noted that the Crown had applied for delayed parole. He agreed that the case was a proper one for the application of s. 743.6. His specific reasons on the question remained faithful to the virtue of conciseness:

> In addition, having regards to Section 743.6 of the *Criminal Code*, I am satisfied, having regards to the circumstances of the commission of the offence and the character and the circumstances of the offender, that the expression of society's denunciation of the offence requires an order that the portion of the sentence that must be served before the offender may be released on full parole is at least one-half of the sentence.

B. *New Brunswick Court of Appeal* (1999), 209 N.B.R. (2d) 257 (Larlee, Turnbull and Rice JJ.A.)

9 With new counsel, Zinck appealed both the 12-year jail sentence and the delayed parole order. Although he was granted leave, his appeal was dismissed in respect of both issues. The Court of Appeal was unanimous as to the jail term itself. Writing for the court on that issue, Larlee J.A. found no error in the judgment of the trial judge. Given the circumstances of the case and the personality of the accused, the punishment fit the crime.

10 The Court of Appeal split on the appropriateness of the delayed parole order. The appellant had submitted that the application of this provision required evidence of special or exceptional circumstances, which had not been established. For the majority, Larlee J.A. disagreed. In her reasons, she held that the trial judge had correctly applied and evaluated the only relevant criteria. These were denunciation of the crime and general and specific deterrence. The criterion of special circumstances should not be read into the statute.

11 Rice J.A. dissented. He stated that the order had been improperly made. It required evidence by the Crown showing that the circumstances and character of the accused were such that he would not be deterred within the normal period of parole ineligibility. He referred in this respect to the judgment of the Court of Appeal for Ontario in *R. v. Goulet* (1995), 97 C.C.C. (3d) 61. In his view, moreover, the reasons of the trial judge had failed to explain why such a measure was required in the circumstances of the case.

12 Zinck then applied for leave to appeal to this Court on the issue of delayed parole. He was granted leave.

IV. Relevant Legislative Provisions

13 *Criminal Code*, R.S.C 1985, c. C-46

743.1 (1) [Imprisonment for life or more than two years] Except where otherwise provided, a person who is sentenced to imprisonment for

(*a*) life,

(*b*) a term of two years or more, or

(*c*) two or more terms of less than two years each that are to be served one after the other and that, in the aggregate, amount to two years or more,

shall be sentenced to imprisonment in a penitentiary.

(2) [Subsequent term less than two years] Where a person who is sentenced to imprisonment in a penitentiary is, before the expiration of that sentence, sentenced to imprisonment for a term of less than two years, the person shall serve that term in a penitentiary, but if the previous sentence of imprisonment in a penitentiary is set aside, that person shall serve that term in accordance with subsection (3).

743.6 (1) [Power of court to delay parole] Notwithstanding subsection 120(1) of the *Corrections and Conditional Release Act*, where an offender receives, on or after November 1, 1992, a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for an offence set out in Schedule I or II to that Act that was prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

(2) [Principles that are to guide the court] For greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles.

Corrections and Conditional Release Act, S.C. 1992, c. 20

120. (1) Subject to sections 747 and 761 of the *Criminal Code* and to any order made under section 741.2 of that Act, an offender is not eligible for full parole until the day on which the offender has served a period of ineligibility of the lesser of one third of the sentence and seven years.

(2) Subject to any order made under section 741.2 of the *Criminal Code*, an offender who is serving a life sentence, imposed otherwise than as a minimum punishment, is not eligible for full parole until the day on which the offender has served a period of ineligibility of seven years less any time spent in custody between the day on which the offender was

arrested and taken into custody, in respect of the offence for which the sentence was imposed, and the day on which the sentence was imposed.

128. (1) An offender who is released on parole, statutory release or unescorted temporary absence continues, while entitled to be at large, to serve the sentence until its expiration according to law.

(2) Except to the extent required by the conditions of any day parole, an offender who is released on parole, statutory release or unescorted temporary absence is entitled, subject to this Part, to remain at large in accordance with the conditions of the parole, statutory release or unescorted temporary absence and is not liable to be returned to custody by reason of the sentence unless the parole, statutory release or unescorted temporary absence is suspended, cancelled, terminated or revoked.

V. Analysis

A. *The Issue*

14 This appeal is concerned solely with the question of delayed parole under s. 743.6 of the *Criminal Code* (formerly s. 741.2). The fitness of the 12-year jail term was not questioned in our Court. No issues of inadequate representation by trial counsel in connection with the Crown's application for delayed parole eligibility were raised in the Court of Appeal or in our Court.

15 The appeal raises closely connected procedural and substantive issues. First, Zinck challenges the procedural fairness of the process which led to the order delaying his eligibility for parole. He submits that the prosecution should give notice in advance of its intention to apply for delayed parole, in order to allow the accused to respond effectively to such an application. Following both parties' submissions, the reasons of the trial judge should address the issue with clarity and precision. Second, the appellant raises the argument that a proper interpretation of s. 743.6 requires that it be applied only in limited cases, upon evidence of extraordinary or exceptional circumstances.

16 The respondent, supported by the intervener, the Attorney General of Ontario, advances a more flexible application of delayed parole. In their opinion, the law does not require prior notice, written or otherwise. Evidence of exceptional circumstances is not required, although the respondent acknowledges that this kind of order represents an exception to normal sentencing practices and should

be treated as such. Delayed parole eligibility may be justified if the Crown merely satisfies the judge that the order is necessary in order to express society's denunciation of the offence or to meet societal objectives of specific or general deterrence.

17 Before I move on to consider the interpretation of s. 743.6 and the procedural fairness issues raised by this appeal, I must first turn to a consideration of the position and nature of delayed parole within the general scheme of the law of sentencing in Canada. It will put the issues raised by the parties in their proper context.

B. *The Nature of Orders for Delayed Parole*

18 The delayed parole scheme under s. 743.6 reflects a relatively recent change in legislative policy on sentencing. It is true that a related provision, which is now found in s. 745.4, had provided for a number of years that a sentencing judge must fix the period of parole ineligibility of an accused convicted of second degree murder. This exception aside, the principles of sentencing drew a clear distinction between the functions of courts, which determined the proper punishment for an offence, and the role of agencies which ran the jails and oversaw the execution of sentences. Eligibility for parole fell within the mandate of the National Parole Board. Considerations relating to parole eligibility normally remained irrelevant to the determination of the fitness of the sentence: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 62, *per* Lamer C.J. While some courts may have increased the length of a jail term to manipulate the term of parole ineligibility, such a practice is quite improper. (See H. Dumont, *Pénologie: Le droit canadien relatif aux peines et aux sentences* (1993), at p. 151; see also A. Manson, "Judges and Parole Eligibility: Section 741.2" (1995), 37 C.R. (4th) 381.)

19 Determining the date and conditions of parole eligibility is usually the prerogative of an administrative body, the Parole Board, in the discharge of its supervisory functions over the execution of sentences. Over time, however, the focus of legislation has shifted. The *Corrections and Conditional Release Act* (the "Act") now puts more emphasis than before on the protection of the public and less on pure rehabilitation objectives and concerns. (See, for example, ss. 4, 102 and 126 of the Act; also, Dumont, *supra*, at p. 299.) Nevertheless, the decision-making process under the Act remains much different from the judicial determination of a fit sentence. It is largely based on the ongoing observation and assessment of the personality and behaviour of the offender during his or her incarceration, which focuses on dangerousness and the offender's ability to re-enter the community (Dumont, *supra*, at p. 333). Such a process may extend over several years and lead to decisions that are highly attentive to context and based, at least in part, on what actually happened during the incarceration of the offender.

20 At the end of this process of observation and review, full parole may be granted. The granting of full parole does not amount to a reduction of the jail sentence. The offender is still serving

his or her sentence until the end of the term. Our Court has defined such a decision as an alteration of the conditions under which the sentence is being served (*Cunningham v. Canada*, [1993] 2 S.C.R. 143, at pp. 150-51, *per* McLachlin J. (as she then was); *M. (C.A.)*, *supra*, at para. 61). At the same time, under s. 128 of the Act, the offender on full parole is entitled to remain at large and is not obliged to live within the four walls of the correctional institution. Although the sentence is not over and measures of supervision remain in place, full parole grants an offender a very substantial degree of personal freedom. As mentioned above, this process generally used to fall outside the functions of the sentencing courts, which did not have to concern themselves about parole eligibility, its conditions and its supervision.

21 In respect of second degree murder, s. 745.4 created a first exception to this principle when it brought initial access to parole within the province of the sentencing judge (*R. v. Shropshire*, [1995] 4 S.C.R. 227). This power was granted in the case of one class of crimes, where delaying parole beyond the statutory minimum of 10 years had become the sole discretion the judge could exercise at the time of sentencing.

22 The adoption of s. 743.6 altered more significantly the nature and scope of sentencing decisions in Canadian criminal law. Section 743.6 applies to a wide spectrum of offences. Some of them carry minimum sentences. In many cases, punishment may range from conditional discharge to life imprisonment. The sentencing judge already had to exercise a broad discretion in determining the appropriate punishment for the specific crime committed by a particular offender. Now, whenever s. 743.6 applies, judges may have to factor in parole ineligibility as an additional variable.

23 It is now well established that the power to delay parole eligibility is part of the sentencing process. Deferred access to parole has now become a part of the punishment, in the case of criminal offences falling within the scope of s. 743.6. Indeed, as this Court held in *R. v. Chaisson*, [1995] 2 S.C.R. 1118, at para. 11 (*per* La Forest J.): "The inclusion of s. 741.2 of the *Code* should ... be understood to indicate an intention on the part of Parliament explicitly to allow a trial judge to reduce the discretion of the Parole Board in certain circumstances, by requiring an accused to serve one half of his or her term of imprisonment before being able to seek parole. The point is that under s. 741.2 the determination of conditional release eligibility has now become a factor in sentencing, and not simply a matter exclusively in the hands of the Parole Board" (emphasis in original); see also *Goulet*, *supra*, at p. 65, *per* Griffiths J.A.

24 Delaying parole can be a significant component of a sentence. It may almost entirely extinguish any hope of early freedom from the confines of a penal institution with its attendant rights or advantages. In this manner, it brings a new element of truth, but also of harshness, to sentencing. The time served in a penitentiary will be closer to the sentence imposed, although, under the Act, the sentence is not over. Given its potential impact, it would have been preferable to be clear about when and why this new sentencing tool is to be used. Regrettably, the drafting of s. 743.6 left many

substantive and procedural questions unanswered. As Fish J.A. of the Quebec Court of Appeal pointed out in one of the earliest cases on the interpretation of this provision, which was decided, like the *Goulet* case, before the enactment of s. 743.6(2), its conceptual basis remains "elusive". It concerns offences in respect of which the sentencing judge must first apply the normal principles of sentencing to the facts in order to determine a fit punishment for the crime. Then, the court must use the same principles all over again, in respect of the same facts — although now with a priority to deterrence and denunciation pursuant to s. 743.6(2) — in order to decide whether parole should be delayed (*R. v. Dankyi* (1993), 86 C.C.C. (3d) 368, at p. 376). The nature of the analytical process required in order to apply this provision remains far from clear. This degree of uncertainty goes a long way towards explaining the problems courts have encountered in their search for a workable and consistent interpretation of s. 743.6, as well as the development of apparently conflicting jurisprudential currents in provincial appellate courts. It remains to be seen whether this conflict amounts to more than a question of semantics, given that Canadian courts have tried to ascertain what the provision really means and how it should work. I will now turn to this problem.

C. *The Interpretation of Section 743.6*

25 This case was described in our Court and in the Court of Appeal as reflecting a clash between narrow and broad interpretations of the power to order delayed parole. One thread in the jurisprudence emphasizes the exceptional nature of the provision and seems to call for a restricted application of this new judicial power. In these judgments, courts have held that delayed parole should be justified by evidence of exceptional circumstances, which would need to be precisely identified and demonstrated in the reasons of the sentencing judge. By contrast, a number of judgments advocate a broader approach to the application of delayed parole, requiring no evidence of exceptional circumstances. On this view, the judge would simply have to find on the evidence whether this additional form of punishment would be appropriate, in the circumstances of each particular case, and considering all the relevant factors, especially deterrence and denunciation.

26 Many judgments have referred in some way to delayed parole as an exceptional measure. Until now, our Court has had no opportunity to consider this issue, which was not raised in *Chaisson*. In *Shropshire*, we reviewed the criteria and procedures governing delayed parole eligibility, but only in the context of a second degree murder, under what is now s. 745.4. Our Court held in that case that the prosecution need not demonstrate unusual circumstances, and that the law did not require that the power to delay parole be used sparingly (*Shropshire*, at para. 31, *per* Iacobucci J.). As mentioned above, the provision at issue in *Shropshire* applied to a particular crime. The problems of the exercise of judicial discretion, the interplay of the sentencing factors, and their respective importance, arise in a different manner under s. 743.6. A method of interpretation and application, coordinating the application of this provision with the classical principles of sentencing and defining its sphere of application, remains to be developed.

27 The theme of the exceptional character of the measure has been much stressed in an

important strand of Canadian appellate jurisprudence. Many judgments express the view that the order to delay parole should be considered an exceptional one. For example, soon after the predecessor to s. 743.6 came into force, comments to this effect were made by Fish J.A. of the Quebec Court of Appeal in *Dankyi*, *supra*, at p. 376, and by Griffiths J.A. of the Ontario Court of Appeal in *Goulet*, *supra*, at p. 65. Their views had a significant influence on later judgments which repeatedly took up the same theme of the exceptional nature of the provision. I did so myself, while on the Quebec Court of Appeal in *Boulanger v. La Reine*, [1995] R.J.Q. 1975, at p. 1978, where I characterized it as [TRANSLATION] "an exceptional measure". (See also *R. v. Ferguson* (1995), 64 B.C.A.C. 211; *R. v. Smith* (1995), 37 C.R. (4th) 360 (Ont. Ct. (Gen. Div.)); *R. v. Osborne* (1996), 110 C.C.C. (3d) 161 (Ont. C.A.); *R. v. Nash-Levy* (1998), 207 N.B.R. (2d) 45 (C.A.); *R. v. Traverse* (1998), 126 C.C.C. (3d) 462 (Man. C.A.); *R. v. Demedeiros*, [1999] O.J. No. 1523 (QL) (C.A.).)

28 Other appellate decisions adopted what appears to be a significantly different and broader approach to the interpretation and application of s. 743.6. According to these decisions, a sentencing judge does not have to look for unusual circumstances before ordering delayed parole. The judge has been granted discretionary power to be used in the appropriate circumstances, where consideration of the relevant sentencing factors justifies its exercise. The Alberta Court of Appeal summarized the gist of this jurisprudential approach in the following manner:

> This court has previously had occasion to consider the scope of s. 743.6 in *R. v. Matwiy* . . . (1996), . . . 105 C.C.C. (3d) 251 (C.A.). This court did not impose on trial judges a requirement that they satisfy themselves that the circumstances were "extraordinary" or "unusual" or "particularly aggravating" so as to permit such an order to be made. The point made by Mr. Justice Iacobucci in *R. v. Shropshire*, *supra*, with respect to what is now s. 745.4 applies with equal force to this section. There is nothing in s. 743.6 which indicates that it is a condition precedent to its exercise that either the circumstances of the offence or the offender be in this "unusual" category, let alone so unusual, in order for a trial judge to impose an order under this section. To judicially impose such a threshold requirement would fetter and undermine the general discretion which Parliament has given to trial judges. What the section does require, and this was confirmed by this court in *Matwiy*, is that the trial judge be convinced that denunciation or specific or general deterrence will not be properly met without a s. 743.6 order, taking into account all relevant circumstances. [Emphasis omitted.]

(*R. v. Hanley* (1998), 228 A.R. 291 (C.A.), at para. 18; see also *R. v. Matwiy* (1996), 105 C.C.C. (3d) 251 (Alta. C.A.); *R. v. Williston* (1999), 209 N.B.R. (2d) 270 (C.A.); *R. v. Cormier* (1999), 140 C.C.C. (3d) 87 (N.B.C.A.); *R. v. Dodd* (1999), 139 C.C.C. (3d) 2 (Nfld. C.A.).)

VI. The Function of Section 743.6

29 The extent of this jurisprudential conflict has been overplayed. It does not reflect a basic disagreement between courts in Canada as to the nature of this provision and its place in the sentencing process. On the contrary, both views address the same difficulty and adopt ultimately consistent solutions to the integration of delayed parole into the process of sentencing. Under both approaches, the same method must be used. That method accepts that delayed parole is a decision that remains out of the ordinary and must be used in a manner that is fair to the offender. Both jurisprudential approaches to the application of s. 743.6 appear to require that the sentencing judge use a two-step intellectual process when deciding whether to delay parole. The addition of this section has not abolished the first duty of the sentencing judge. He or she must first determine what would be the appropriate punishment for the crime. The issue of parole eligibility is not considered at this stage. Courts consider all relevant factors and weigh them, in the circumstances of the case and taking into account the character of the offender. On the basis of this analysis, the judge determines the duration of the jail sentence, if imprisonment is required by law or appears necessary.

30 At this point, the analysis may shift to the exercise of the power to delay parole. The position of s. 743.6 in the *Criminal Code* signals that it should not be applied in a routine manner. The power should not be exercised in a mechanical or automatic way, nor invoked in connection with every jail term imposed for an offence covered by s. 743.6. The judge must once again apply the sentencing factors. In this part of the process, however, the addition of s. 743.6(2) requires that, in the course of this second balancing, priority be given to the factors of general and specific deterrence, and of denunciation. The other factors remain relevant, but, to the extent of any conflict, subordinated to those identified by Parliament. It is worth noting that Parliament has not given priority to these specific factors in the application of s. 745.4.

31 At this stage, having given priority to the factors of deterrence and denunciation as required by law, and having duly considered all the criteria and principles relevant to sentencing, based on the evidence at the sentencing hearing and at trial, the court must arrive at its conclusion as to whether this additional punishment is required. The prosecution has the burden of demonstrating that it is. The judge must satisfy himself or herself that the order is needed to reflect the objectives of sentencing, with awareness of the special weight ascribed by Parliament to the social imperatives of denunciation and deterrence. Nevertheless, at the end of this intellectual process, the sentencing decision must remain alive to the nature and position of delayed parole in criminal law as a special, additional form of punishment. Hence it should not be ordered without necessity, in a routine way. This idea is acknowledged by Griffiths J.A. of the Ontario Court of Appeal in *Goulet* (p. 65). It is this aspect of s. 743.6 that explains the development of the jurisprudential current emphasizing its exceptional nature. The other stream of jurisprudence, which shies away from using the vocabulary of an "exceptional measure", does not seem, in practice, to have applied s. 743.6 in a different manner. None of these judgments has suggested that a delayed parole order should be considered an ordinary measure, to be applied in the normal course; they agree that it should be invoked only on the basis of demonstrated need.

32 The application of s. 743.6 will probably never be an easy task for judges. Sentencing remains a heavy responsibility for trial and appellate judges throughout Canada. The exercise of the power to delay parole adds to the difficulties of this task. With a proper understanding of the nature of the measure, it is to be hoped that its application will be less problematic.

33 As mentioned above, courts must perform a double weighing exercise. First, they must evaluate the facts of the case, in light of the factors set out in s. 718 of the *Code*, in order to impose an appropriate sentence. Then, they must review the same facts primarily in the perspective of the requirements of deterrence and denunciation, which are given priority at this stage, under s. 743.6(2). The decision to delay parole remains out of the ordinary, but may and should be taken if, after the proper weighing of all factors, it appears to be required in order to impose a form of punishment which is completely appropriate in the circumstances of the case. This decision may be made, for example, if, after due consideration of all the relevant facts, principles and factors at the first stage, it appears at the second stage that the length of the jail term would not satisfy the imperatives of denunciation and deterrence. This two-stage process, however, does not require a special and distinct hearing. It should be viewed as one sentencing process, where issues of procedural fairness will have to be carefully considered.

VII. Procedural Issues and Fairness

34 Acknowledging that delayed parole should not be a routine part of every sentencing decision under s. 743.6 does not imply that there should be a special and distinct hearing on the issue, where evidence of unusual or extraordinary circumstances must be introduced. Section 743.6 does not require the creation of such an additional procedure. A two-step intellectual process does not turn the sentencing hearing into two separate procedures. It should be enough that the issue be raised in a fair and timely manner so as to allow the offender to respond effectively. A breach of this basic obligation would justify quashing the order, as courts have done on occasion. (See *Corneau v. La Reine*, [2001] R.J.Q. 2509 (C.A.), at p. 2515.) Beyond this, the sentencing hearing should not be overburdened with formalistic and unnecessary procedural requirements.

35 The need for fairness does not impose any obligation to give written notice to the offender before the hearing that delayed parole will be applied for. Such an obligation would often be impractical, especially since sentencing hearings frequently take place immediately after the conviction or guilty plea. In addition, the *Criminal Code* does not expressly require written notice any more than did s. 745.4, which was considered in *Shropshire*, *supra*.

36 The obligation to assure fairness in the process is of critical importance, but it may be discharged in different and equally valid ways. When possible, the Crown may give notice in writing or

verbally before the hearing. The application may be made at the sentencing hearing itself. The issue may also be raised by the judge in the course of the hearing. Whenever and however the question is brought up, the offender must be informed clearly that he is at risk in this respect. The offender must be allowed to make submissions and to introduce additional evidence, if needed, in response to the request for delayed parole. Courts should be generous if adjournments are requested for this purpose. Fairness must be preserved, but in a flexible manner, taking into account the specifics of each case, without pointless procedural constraints.

37 At the end of the process, the offender is entitled to reasons. The judgment must state with sufficient clarity the reasons why the delayed parole order is made. It must remain consistent with the principles set out in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26. The reasons need not be elaborate. The basis of the decision must be at least ascertainable from the record; precision and clarity remain advisable in the drafting of such judgments. Deficiencies in reasons may sometimes require quashing an order for the sake of the perceived fairness and the transparency of the criminal process.

VIII. Application of Principles

38 A review of the judgment and proceedings in this case confirms that none of the grounds of appeal have been established. The trial judge did not err in his application of s. 743.6. The order was justified on the basis of the record and was made after a hearing that did not breach the rules of procedural fairness.

39 I concede that the part of the reasons dealing expressly with the issue of delayed parole is somewhat imprecise. A more detailed analysis should have been attempted. The reasons, though, must be viewed as a whole and read in connection with the evidence and the submissions made at the hearing. Although not extensive, the reasons permit an appellate court to ascertain and review the basis of the order made by the trial judge. Thus, they do not breach the *Sheppard* standard. Godin J. carefully reviewed all relevant facts, particularly the gratuitousness of the crime and the need to protect the public. They confirm his conclusion that the objectives of deterrence and denunciation could not be satisfied without delaying parole eligibility.

40 Procedural fairness was observed. In its submissions, the Crown asked for delayed parole. The accused, through his counsel, could have made his own submissions or presented evidence to oppose the Crown's request. He could have requested an adjournment, if the Crown's move took him by surprise. None of this was attempted. It was never suggested that this was a case of inadequate representation. The accused was given a sufficient opportunity to respond to the Crown's request. He failed to use it. He cannot fault the judge for this.

41 The Court of Appeal took the appropriate approach to the review of a sentencing decision. In the absence of an error of principle, a breach of the principles of procedural fairness or a clearly erroneous and material finding of fact, it decided that it should not intervene. Its decision was well founded. It can be upheld under both the narrow and the broad interpretations of s. 743.6, which can be reconciled, as indicated above.

IX. Disposition

42 For these reasons, I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: Eric J. Doiron, Moncton.

Solicitor for the respondent: Attorney General of New Brunswick, Moncton.

Solicitor for the intervener: Attorney General of Ontario, Toronto.